IN THE

# SUPREME COURT

OF THE

# UNITED STATES

**OCTOBER TERM, 1961**

**No. 736**

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WHITEFISH LUMBER COMPANY

Petitioner

vs.

INDUSTRIAL SUPPLY CO., PACIFIC POWER AND LIGHT COMPANY, KOLIN MACHINE WORKS, KALISPELL MERCANTILE CO., AND FRANCIS POULSON,

Respondents

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## BRIEF IN OPPOSITION

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## Argument

Petitioner seeks a writ of certiorari on the reasoning that the holding of the Circuit Court of appeals for the Ninth Circuit in this case is in apparent con-

flict with the holdings in the Tenth Circuit and the Second Circuit and in conflict with the holdings of this Court in similar cases. This same position and basic argument of petitioner has been repeatedly urged since the inception of this action. It has been overruled and rejected first by the Honorable W. J. Jameson, Judge of the District Court for the District of Montana, by the referee in bankruptcy in this matter, again by Judge Jameson on petition for review, and finally by the Court of Appeals for the Ninth Circuit.

No conflict with holdings of other circuit courts or with any holding of this Court exists in fact. Judge Jameson of the District Court and the Court of the Ninth Circuit gave full consideration to this same theory of petitioner as is readily apparent from their respective decisions. Not only do the cases relied upon by petitioner differ materially in a factual respect from the instant case, both as to the instrument involved and the state statutes applicable or pertinent, but such cases are no longer properly expressive of the law in view of the fact that Section 60 of the Bankruptcy Act has been materially changed from its provisions in 1935. The 1938 and 1950 amendments to Section 60a require completely new rules of law to be applied to a factual situation such as we have in this case which were not called for under the Bankruptcy Act prior to those amendments. The District Court and the Circuit Court have applied such rules. Petitioner has cited no cases decided since these amendments, which are in conflict with the holdings in this case under the law as it now is expressed in Section 60a.

The fundamental question in this case, clearly recognized by the District Court and by the Circuit Court, is whether the giving of a new or "renewal" mortgage

constitutes a preferential transfer as defined in Section 60a where such mortgage is given and filed after the expiration of time specified in the Montana statutes for a chattel mortgage to be effective as against creditors or subsequent purchasers or incumbrances in good faith. It is admitted that such a renewal mortgage was given in this case and that it was filed with the proper county official under Montana law "within four months before the filing—against him (the bankrupt) of the petition" in this case.

We feel that the District Court and the Circuit Court adequately and correctly analyzed the pertinent portions of Section 60a of the Bankruptcy Act and the appropriate statutes of the State of Montana (Sections 52-305 and 52-306, Revised Codes of Montana, 1947, see petition, page 5) and that anything that we might add in this brief on that question might well be cumulative only and surplusage.

Under Montana law the "transfer" became "perfected," as defined in Section 60a(2) when it was filed. The original mortgage "ceased to be valid as against creditors of the mortgagor • • • " under Section 52-305, R. C. M., 1947, when no affidavit of renewal was filed within the proper time. Approximately twenty days later a new mortgage was filed so as to create a lien on the bankrupt's property. During that twenty-day period, it is apparent that any creditor could have obtained a lien on such property by "attachment, garnishment, execution, or like process • • • " such as is defined in Section 60a(4) of the Bankruptcy Act. However, after the new mortgage was filed, then under Montana law "it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee," (Sec-

tion 60a(2). This is precisely the type of "transfer" intended to be described by the 1950 amendments to Section 60. We respectfully refer the Court to that portion of the District Court's opinion appearing on pages 23 through 25 of petitioner's petition and the language of the Circuit Court on page 31 wherein these matters are fully discussed.

Petitioner maintains that it should be necessary for the bankruptcy court, in a case of this kind, to determine whether the Montana statute above cited was of such nature to give the mortgagee "some security" even though the filing period had expired, or whether the failure to renew the mortgage within the statutory period rendered it absolutely void. (Petition, page 9).

In urging this position, petitioner completely overlooks and disregards the specific language of Section 60a(2) of the Bankruptcy Act. The words used in that section in referring to the time a transfer of property "shall be deemed to have been made or suffered" establish such time with complete certainty. It is "when it became so far **perfected** that no subsequent lien • • • could become superior to the rights of the transferee." (Emphasis supplied).

Thus it is the time of **perfecting** the lien that is all-important. That is now the time that must control the determination as to whether the transfer is one described by Section 60a of the Act if the other requisite elements are present. And under the Montana statutes above cited the time of the filing of the new mortgage governed its effectiveness since the old or prior mortgage had then ceased to be valid "as against creditors of the mortgagor" and others under the very specific provisions of Section 52-305, R. C. M., 1947, set forth on page 21 of the petition herein.

Whether or not the old or prior mortgage continued

to be effective, after the filing period expired, as between the parties to the mortgage, is of no concern to the bankruptcy court. To the extent that it remained effective between such parties, the mortgagee had "some security." But since a general creditor could have then obtained a lien "by legal or equitable proceedings on a simple contract," as defined in Section 60a(4) of the Act, which lien would have "become superior to the rights of the transferee," and could not have done so after the filing of the new mortgage, then such filing of the new mortgage constituted accomplishment of a preferential transfer as defined in Section 60a.

Petitioner makes reference to "windfalls" realized by general creditors on the expiration of the statutory filing period, and to the "injustice" which results from the decisions of the lower courts in this matter.

It should be noted that it is not the mortgage-transferee who is complaining here but the mortgagor who continues to owe the debt reflected in the mortgage. It should also be noted that the mortgagee had the means within its power to keep the original mortgage alive had it desired to do so. There may have been any number of reasons why it did not file a renewal affidavit. We are not here concerned with such speculation nor should it be used as a reason for granting certiorari in this action.

## Conclusion

There being no conflict between the decision of the Court of Appeals in this matter with any decision of another court of appeals on the same or even similar matter, and the decision of the Court of Appeals

in this matter not being in conflict with any decision of this Court on the pertinent provisions of the Bankruptcy Act, no special or important reasons exist for the granting of a review herein on a writ of certiorari and the petition filed herein should be denied.

Respectfully submitted,

Calvin S. Robinson,
Counsel of Record for Respondents.

Merritt N. Warden,
Counsel for Respondents.

Counsel for Respondents:

Calvin S. Robinson
Murphy, Robinson & Keller
Counsel of Record for Respondents.
No. 1 Main Street
Kalispell, Montana.

Merritt N. Warden
Walchli, Korn, Warden & Walterskirchen
Counsel for Respondents.
M & M Building
Kalispell, Montana.